No. 85-1984

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT B. GRAHAM,

Petitioner,

-vs-

UNITED STATES OF AMERICA

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

PETITION FOR WRIT OF CERTIORARI

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19pp

QUESTION PRESENTED

Whether trial counsel's failure to object to the Court's supplemental Allen charge constituted ineffective assistance of counsel, when that type of charge has been banned in the Third Circuit, although not in other circuits, and when that charge directly contributed to the Petitioner's conviction.

TABLE OF CONTENTS

Question Presented i

Index of Authorities iv

Opinions Below vi

Jurisdiction vii

Statutory Provision Involved viii

Statement of the Case 2

Reason for Granting the Writ 9

Argument:

TRIAL COUNSEL'S FAILURE TO OBJECT TO THE SUPPLEMENTAL ALLEN CHARGE CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL.....9

CONCLUSION.....23

Appendix A - Opinion of the Third Circuit Court of Appeal affirming the Petitioner's conviction 1a

Appendix B - Memorandum and Order of Honorable Clarence C. Newcomer, U.S. District Court Judge, denying Petitioner's 28 U.S.C. Section 2255 Motion. 25a

Appendix C - Judgment Order of Third Circuit Court of Appeals afirming court's denial of Petitioner's 28 U.S.C. 2255 motion. 39a

Appendix D - Affidavit of Petitioner's Trial Counsel. 41a

TABLE OF AUTHORITIES

CASES:

Allen v. United States, 164, U.S. 492, 41 L. Ed.2d 528, 17S.ct 154 (1896) 15

Government of Virgin Islands v. Bradshaw, 726 F. 2d 115 (3rd Cir. 1984) 14

Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977), cert. den., 435 U.S. 1011, 985. Ct. 1885, 56 L. Ed. 2d 394 (1978).....21

Strictland v. Washington, ___ U.S. __, 1045 S.Ct., 2052 (1984) 12, 17, 19, 20

United States v. Fioravanti, 412 F. 2d 407 (3rd Cir. 1969), cert. den.396 U.S. 837 90 S. Ct. 97, 24 L. Ed. 2d 88 9

STATUES:

18 U.S.C. 371 1

26 U.S.C. 7206 (2) 1

28 U.S.C. 1254 (1) vii

28 U.S.C. 2255 8

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBERT B. GRAHAM, SR., by and through his Attorney, NINO V. TINARI, ESQUIRE, petitions herein for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Third Circuit affirming the lower court's denial of the petitioner's motion to vacate, set aside, or correct sentence pursuant to U.S.C. Section 2255.

OPINIONS BELOW

The Order and Memorandum Opinion of the lower court denying the petitioner's 2255 motion to vacate or set aside sentence was filed on June 21,

1985, and is reprinted in full as "Appendix B" hereto. That opinion has not been reported.

The Judgment Order of the United States Court of Appeals for the Third Circuit affirming the lower court's denial of the petitioner's 2255 motion to vacate or set aside sentence was filed on March 5, 1986, and is reprinted in full as "Appendix C" hereto.

JURISDICTION

The Judgment Order appealed from was filed on March 5, 1986. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254 (1).

STATUTORY PROVISION INVOLVED

No statutory provision is involved in this Petition for Writ of Certiorari.

STATEMENT OF THE CASE

On September 16, 1983 ROBERT B. GRAHAM, SR. was convicted of conspiracy to defraud the United States, 18 U.S.C. Sections 371, and aiding the filing of false tax returns. 26 U.S.C. Section 7602 (2).

The jury trial began on August 31, 1983. After hearing nine (9) days of testimony, the jury retired at 3:44 P.M. on Wednesday, September 14, 1983 to deliberate on the thirty-six (36) counts of the indictment. The jury was sent home at 5:27 P.M. that evening, then resumed its deliberations at 9:30 A.M. the following morning, Thursday, September 15. The jury deliberated all day Thursday and was sent home at 10:05 P.M. The jury resumed its deliberations at

9:00 A.M. Friday, September 16.

On the morning of Friday, September 16, at 11:00 A.M., the jury sent the following note to the district court judge:

> YOUR HONOR,
>
> After approximately 17 hours of deliberations we have reached a verdict against only one of the defendants on two counts.
>
> After careful and intensive debate, there is no doubt in any of our minds that we cannot reach a unanimous (sic) verdict on any of the other charges.
>
> Therefore further deliberations would be fruitless.
>
> David Racher.

The judge read this message to counsel and indicated that he would give a supplemental charge. No defendant requested that the jury be polled at this point, so it was never known who the defendant was that the jury had found to be guilty on two counts.

The supplemental charge to the jury included language which was aimed at obtaining a jury verdict by breaking the jury's deadlock:

> "If much the greater number of you are for a conviction, each descenting (sic) juror ought to consider whether a doubt in his or her mind is a reasonable one, since it makes no effective impression upon the minds of so many equally

honest, equally conscientious fellow jurors who fear the same responsibility, serve under the same oath, and have heard the same evidence with, we may assume the same attention, and an equal desire to arrive at the truth.

On the other hand, if a majority or even a lessor number of you are for acquittal, other jurors ought to seriously ask themselves again, and most thoughtfully, whether they do not have reason to doubt the correctness of a judgement which is not incurred (sic) in by so many of their fellow jurors, and whether they should not distrust

> the weight and sufficiency of evidence which fails to convince the minds of several of their fellow jurors beyond a reasonable doubt."

At no time before the announcement of the verdicts by the jury did any defendant object to the portion of the charge that directed a minority of the jurors to reconsider their positions in light of the positions taken by the majority of the jurors.

At 3:20 P.M. that Friday, after approximately two (2) hours deliberations, the jury announced that it had reached verdicts on a total of eight (8) of the thirty-six (36) counts. The district court judge accepted this verdict.

Petitioner was convicted of conspiracy to defraud the United States and aiding the filing of false tax returns. (Counts 1, 22, 23 of the indictment). The petitioner filed a Notice of Appeal with the district court; on March 26, 1985, the Third Circuit Court of Appeals affirmed the district court's decision. (Opinion reported at 758 F. 2d 879 (3rd Cir. 1985), and attached hereto as "Appendix A"). The petitioner then petitioned the appellate court for a rehearing and that request was denied on May 2, 1985.

On April 24, 1985, the petitioner filed a Motion to Vacate, Set Aside, or Correct Sentence by a person in Federal Custody with the trial court,

arguing, inter alia, that the failure of defense counsel to object to the supplemental Allen charge given by the trial court judge constituted ineffective assistance of counsel. On June 20, 1985, the trial court judge denied the petitioner's 2255 Motion.

On, or about, May 7, 1985, the petitioner filed with the district court an affidavit executed by his trial counsel in support of his (the petitioners' 2255 Motion (42a-44a) . In that affidavit, the petitioner's trial counsel admitted that he failed to object to the trial court judge's supplemental Allen charge, and that his failure resulted in a manifest injustice to the petitioner. (43a).

On June 20, 1985, the trial court judge denied the petitioner's 2255 Motion to Vacate Sentence, reasoning, in part, that the petitioner failed to establish a "reasonable probability" that but for trial counsel's failure to object to the supplemental Allen charge, the decision reached would have been different. (34a-35a).

The petitioner appealed the trial court's denial of his 2255 Motion to Vacate Secntence to the United States Court of Appeals for the Third Circuit. On March 5, 1986, the appellate court affirmed the judgment of the district court. (39a-40a).

This petition for Writ of Certiorari now follows:

REASON FOR GRANTING WRIT

In this case, a supplemental jury charge was given by the trial court judge after the jury had deliberated for 17 hours, reaching a verdict of guilt on only two counts, both of which were as to the same defendant. The supplemental charge given by the trial court judge required the jurors in the minority to reconsider their position, and was in violation of United States v. Fioravanti, 412 F. 2d 407 (3rd Cir.), dert. den. sub. nom. Pannaccione v. United States, 396 U.S. 837 (1969) (Held that in the Third Circuit, trial judges are not to give instructions either in the main body of the charge or in the form of a supplement that direct a juror to distrust his own

judgment if he finds a large majority of the jurors taking a different view from his, and that such an instruction will be deemed error, normally reversible error requiring that a verdict which has been influenced in any way by such a charge not be let to stand). (9a-10a). In its affirmation of the petitioner's conviction the Third Circuit Court of Appeals even went so far as to state that the supplemental charge given by the trial court judge "offends our Fioravanti decision and should not have been given. However, ..., no objection was ever made prior to the jury's verdict". (10a). (Emphasis added) Approximately four hours after the giving of this supplemental charge, the jury returned from its deliberations and delivered guilty verdicts on an addi-

tional six counts.

It is important to note that the identity of the defendant as to whom the initial 2 counts of guilt were found is unknown. All that is known is that those two counts were as to the same defendant. Only two of the four defendants were found guilty of more than one count, the Petitioner and Joseph Balchaitus, while the remaining two defendants were found guilty on one count each. Therefore, either the Petitioner or Joseph Balchaitus was facing an acquittal prior to the supplemental charge, followed by a conviction after the subject charge was given. The Petitioner respectfully submits that it is just as likely to presume that he was the defendant who went from an acquittal to a con-

viction as a result of the subject charge as it is to presume that defendant Balchaitus experienced the reversal.

The standard to be applied to a post conviction claim of ineffective assistance of trial counsel was recently announced by the Supreme Court in Strictland v Washington - U.S. - 1045 S. ct. 2052, 2064 (1984). There, the court held as follows:

> "A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel was not

functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious so to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that orders the result unreliable".

In order to establish a claim of ineffective assistance of trial coun-

sel, then, one must satisfy each of the two requirements enunciated by the Court in Strictland. When applying the facts of this case to that standard, the defendant more than sufficiently satisfies each of these requirements.

Initially, the defendant must demonstrate that counsel's performance was deficient to the extent that the errors made were so serious that counsel was not functioning as quaranteed by the constitution. The constitutional right to effective assistance of counsel demands that the defendant's attorney exercise the "customary skill and knowledge which normally prevails at the time and place of the trial by the Sixth Amendment". Government of Virgin Islands v

Bradshaw, 726 F. 2d 115 (3rd Cir, 1984). In this instance, counsel for defendant Graham failed to timely object to the supplemental jury charge requiring the jurors in the minority to reconsider their position; an Allen charge. (See Allen v. United States 164 U.S. 492 (1896).)

Trial counsel for the petitioner however, failed to timely object to the supplemental charge given by the trial court judge. His failure to undertake even the most basic of research regarding supplemental jury instructions either before such was given, or immediately thereafter constituted unprofessional error. Because the jury had already been deliberating for seventeen (17) hours before the deadlock was

announced, counsel had to be aware of the possibility of a deadlock and also the possibility that the court would provide some guidance to the jury. In addition counsel likewise had the opportunity to object after the charge was given, as the jury deliberated for some three and one-half hours more. Counsel's failure to research and investigate allowable supplemental jury instructions in this circuit was error.

Trial counsel for the petitioner even went so far as to admit to his ineffectiveness. In an "affidavit" filed in support of the petitioner's 2255 motion to vacate or set aside sentence, trial counsel for the petitioner states that his failure to timely object to the trial

court's giving of the subject supplemental charge resulted in a "manifest injustice" to the petitioner.(43a).

Errors by trial counsel reach the level of ineffectiveness when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different". Strictland, supra, at 104 S. Ct. at 2086. A "reasonable probability" is the probability sufficient to undermine confidence in the outcome. Id., at 2068.

In the instant case, such a "reasonable probability" exists. For prior to the giving of the banned Allen charge, the jury was able to reach a verdict against only one of the defen-

dants on two counts. After the Allen charge was given, however, the jury returned with verdicts on an additional nine counts;, six of guilty and three of not guilty. Of overwhelming importance, however, is the fact that no timely request to poll the jury was made, either before the Allen charge was given or after, this making impossible a determination as to which defendant the jury initially found guilty on two counts prior to the Allen charge's being given. Because only two defendants were eventually found guilty on multiple counts (defendants Graham and Balchaitus), only defendant Graham or Balchaitus could have initially been found guilty prior to the Allen charge's being given. Thus, there is a "reasona-

ble probability" that "but for" the giving of the banned Allen charge, defendant Graham went from zero counts of guilt, or a verdict of acquittal, to being found guilty on three counts, or a conviction. Again because the jury was not polled prior to the giving of the Allen charge or immediately thereafter, the initial guilty verdict reached by the jury against only one defendant prior to the Allen charge may not have been against defendant Graham. Thus, it would only have been after the giving of the banned Allen charge that defendant Graham was found guilty on three counts. This is precisely the type of "reasonable probability" sufficient to "undermine confidence in the outcome" the court addressed in Strictland Id., at 2068.

Strictland also emphasizes the fact that in order to provide reasonably effective assistance to their clients, criminal defense attorney's must interview potential witnesses and make independent investigation of facts and circumstances, as well as the law involved in a particular case (emphasis added). Id., at 2052, 2065 (1984).

In the instant case the record reveals that trial counsel failed to inform himself of the law of the Third Circuit as to Allen charges. Under the circumstances, his failure to object to the subject Allen charge constituted ineffective assistance of counsel.

In the instant case, the record reveals that trial counsel did not object when an illegal (in the Third Circuit)

supplemental jury charge was given. Therefore, the Appellant respectfully submits that it is reasonable for this Honorable Court to conclude that trial counsel's failure to object to the banned Allen charge constituted an error "so flagrant that a court can conclude that it resulted from neglect or ignorance rather that informed professional deliberation". Marzullo v. Maryland, 561, F.2d 540, 544 (4th Cir. 1977), cert. denied, 435 U.S. 1011, 98 S. Ct. 1885, 56 L. Ed. 2d 394 (1978).

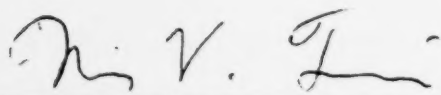
The Petitioner argues that the errors and omissions of his trial counsel in failing to adequately investigate Third Circuit law and in failing to object to the subject Allen charge resulted in denying the Appellant of a fair trial.

The Petitioner's defense was impaired because of trial counsel's failure for two reasons: 1) the Appellant might not have been convicted but for the giving of the Allen charge; and 2) the Appellant certainly would have been entitled to a new trial had a contemporaneous objection been made. At the very least, a contemporaneous objection to the subject Allen charge, even one made at the very end, would have entitled the Appellant to a new trial.

CONCLUSION

For the reasoning outlined above, the Petitioner respectfully requests that this most Honorable Court grant his Petition for Writ of Certiorari.

Respectfully submitted,



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PROOF OF SERVICE

STATE OF PENNSYLVANIA:
SS.
COUNTY OF PHILADELPHIA:

MARK D. MUNGELLO, after being duly sworn, deposes and says that pursuant to rule 28.4(a) of this Court he served the within PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE THIRD CIRCUIT on counsel for the Respondent by enclosing a copy thereof in an envelope, first class postage prepaid, addressed to:

Solicitor General of
the United States
Department of Justice
Washington, D.C. 20530

and depositing the same in the United States mails in Philadelphia, Pennsylvania on this 29th day of MAY, 1986.

Mark D. Mungello
Affiant

Sworn to and subscribed before me on this 29th day of May, 1986.

Notary Public

JOSEPH C. O'DONOVAN
Notary Public, [illegible] Co.
My Commission Expires Jan. 22, 1989

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 83-1797, 83-1932,
83-1933, 83-1934

UNITED STATES OF AMERICA

v.

GRAHAM, ROBERT B.

Robert B. Graham Sr., *Appellant*

On Appeal from the District Court
for the Eastern District
of Pennsylvania
D.C. Crim No. 83-00140-01

No. 83-1798, 83-1810

UNITED STATES OF AMERICA

v.

GREENSPUN, MILTON

Appellant

On Appeal from the District Court
for the Eastern District
of Pennsylvania
D.C. Crim No. 83-00140-01

APPENDIX A

No. 83-1805, 83-1836

UNITED STATES OF AMERICA

v.

KIRBY, WILLIAM P.

William P. Kirby, *Appellant*

On Appeal from the District Court
for the Eastern District
of Pennsylvania
D.C. Crim No. 83-00140-02

No. 83-1837, 83-1935

UNITED STATES OF AMERICA

v.

BALCHAITIS, JOSEPH,

Appellant

On Appeal from the District Court
for the Eastern District
of Pennsylvania
D.C. Crim No. 83-00140-03

Argued Thursday, December 13, 1984

BEFORE: GARTH and HIGGINBOTHAM,
Circuit Judges
and McCUNE, *District Judge*

Honorable Barron P. McCune, United States District Judge for the Western District of Pennsylvania, sitting by designation.

(Opinion filed March 20, 1985)

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OPINION OF THE COURT

GARTH, *Circuit Judge*:

Robert B. Graham was convicted of conspiracy to defraud the United States, 18 U.S.C. § 371, and aiding the filing of false tax returns, 26 U.S.C. § 7206(2). William Kirby was convicted of conspiracy to defraud. Joseph Balchaitis was convicted of conspiracy to defraud, filing a false W-4 exemption certificate, and failure to file income tax returns. Milton Greenspun was convicted of conspiracy to defraud the United States. Each appealed.

All the appellants were involved in a group called the Committee for Constitutional Taxation. This group conducted a series of public seminars directed at educating citizens about tax protest, the constitutional aspects of income tax reporting, and the methods by which they could avoid paying taxes and thwart IRS investigations. At these seminars, attendees were instructed about how to file "fifth amendment tax returns" which disclosed little or no information about the taxpayer's income, but which contained entries stating "OBJECT - FIFTH AMENDMENT." They were also advised to set up foreign bank accounts and they were instructed to claim loss of memory if called by a grand jury.

The defendants challenge their convictions on a great number of grounds, all of which we find to be without merit.[1] Only a few of the alleged errors warrant discussion. Perhaps the most troubling challenge concerns a supplemental charge given to the jury after it had indicated that it was deadlocked. However, finding no reversible error preserved for review, we affirm all the judgments of conviction.

I.

The defendants' trial started on Wednesday, August 31, 1983. On Monday, September 12, while testimony was still being heard and two days before deliberations began, one juror sent the judge the following note:

> Your Honor,
>
> I would like to request of the court on behalf of the Jewish juror's [sic] and possible others, that we be *dismissed* on *Friday* at *4:00 P.M.* This is the eve of *Yom Kippur* which starts the beginning of a 24 hour fast. We must be home to prepare and eat dinner before 6:00 P.M. in order to begin the holiday tradition of synagogue and our fast.
>
> Thank you very much for your consideration.
>
> Susan Ball
> Seat #12

Ct. Ex. #3. The district court judge never directly responded to the jury with respect to this request. No member of the jury ever raised the issue again.

After hearing nine days of testimony, the jury retired at 3:44 pm on Wednesday, September 14, 1983 to deliberate on the thirty-six counts of the indictment. The jury was sent home at 5:27 that evening, then

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1. The various grounds upon which the defendants have challenged their convictions are set forth in Appendix A attached to this opinion.

resumed its deliberations at 9:30 am the following morning, Thursday, September 15. The jury deliberated all day Thursday and was sent home at 10:05 pm. The jury resumed its deliberations at 9:00 am on Friday, September 16. The evening of Friday, September 16, 1983 was the commencement of the Jewish High Holy Day of Yom Kippur.

On the morning of Friday, September 16, at 11:00 am, the jury sent the following note to the district court judge:

> Your Honor,
>
> After approximately 17 hours of deliberation we have reached a verdict against only one of the defendants on two counts.
>
> After careful and intensive debate, there is no doubt in any of our minds that we can not reach a unaminous [sic] verdict on any of the other charges.
>
> Therefore further deliberations would be fruitless.
>
> David Racher

Ct. Ex. #8. The judge read this message to counsel and indicated that he would give the jury a supplemental charge.

At this point, counsel for Kirby, concerned that the jury might consider four o'clock that afternoon as a deadline for its verdict, requested that the jury be informed in the court's supplemental charge that they need not reach a verdict by four o'clock to be excused for the Jewish holiday. The judge assented to this request, stating, "All right I'll say something to that [effect]." However, in instructing the jury the judge failed to address the specific subject of a four o'clock departure time. The judge did tell the jury that "There are no time deadlines within which you must reach your verdict." Appendix at 239a. Thus, the instruction

given to the jury did not directly respond to the juror's request which had been made four days earlier, but it did unequivocally state that no time limitations restricted the jury's deliberations.

The charge did include language which was aimed at obtaining a jury verdict by breaking the jury's deadlock:

> If much the greater number of you are for a conviction, each descenting [sic] juror ought to consider whether a doubt in his or her mind is a reasonable one, since it makes no effective impression upon the minds of so many equally honest, equally conscientious fellow jurors who bear the same responsibility, serve under the same oath, and have heard the same evidence with, we may assume, the same attention, and an equal desire to arrive at the truth.
>
> On the other hand, if a majority or even a lesser number of you are for acquittal, other jurors ought to seriously ask themselves again, and most thoughtfully, whether they do not have reason to doubt the correctness of a judgment which is not incurred [sic] in by so many of their fellow jurors, and whether they should not distrust the weight and sufficiency of evidence which fails to convince the minds of several of their fellow jurors beyond a reasonable doubt.

Immediately after the supplemental charge had been read to the jury and the jury had retired, counsel for Kirby again asked that the jury be informed that there was no four o'clock deadline. The district court judge replied, "Well, I don't know how I could make it any clearer." Appendix at 240a.

Counsel for Graham at this stage requested a further charge with respect to first amendment protection for some of Graham's activities. Counsel for Greenspun objected to a portion of the supplemental

charge which discussed the length and expense of the trial. At no time before the announcement of the verdicts by the jury did any defendant object to the portion of the charge that directed a minority number of the jurors to reconsider their positions in light of the positions taken by the majority number of the jurors.

At 3:20 pm that Friday (September 16, 1983), the jury announced that it had reached verdicts on a total of eight of the thirty-six counts. The district court judge accepted this verdict. No timely request to poll the jury was made.[2] The judge dismissed without prejudice the counts on which the jury was unable to reach a verdict and then discharged the jury.

II.

Under Federal Rule of Criminal Procedure 30,

> No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection.

This Court in a recent *in banc* opinion reconfirmed that it will not consider on appeal, objections that were not timely raised before the trial court. *United States v. Gibbs*, 739 F.2d 838 (3d Cir. 1984) (*in banc*), *cert. denied*, 53 U.S.L.W. 3483 (January 7, 1985). The bar against review of objections that have not been timely made is especially important where, as here, a timely objection would have allowed the trial judge to correct his error and obviate the need for a new trial.

In *Gibbs*, we declined to review a defendant's sixth amendment confrontation clause claim that was not timely asserted before the district court. In *Gibbs*, the defendant challenged the admission of testimony of an

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2. Counsel did request a poll of the jury after the verdict was recorded. Such a request is untimely. See Fed. R. Crim. P. 31(d).

alleged co-conspirator who had not been proved to be unavailable. No constitutional objection to this testimony was made until after both parties rested. We noted in *Gibbs* that had the defendant made a timely sixth amendment objection, the sixth amendment defect could have been cured by calling the declarant or by proof of the unavailability of the declarant of the challenged testimony. 739 F.2d at 849.

Similarly, had any defendant here timely objected to the charge which required the jurors in the minority to reconsider their position, the district court judge could have given a corrective instruction. Indeed, had any defendant called the court's attention to this Court's opinion in *United States v. Fioravanti*, 412 F.2d 407 (3d Cir.), *cert. denied sub nom. Pannacione v. United States*, 396 U.S. 837 (1969), there can be no question but that the district court judge would have revamped his supplementary charge and given the proper *Fioravanti* instruction. Since no such objection was made, however, the issue has not been preserved for review.

We recognize that an "*Allen*" charge (see *Allen v. United States*, 164 U.S. 492 (1896)), such as the one given in this case, has been discredited in this Circuit. According to *United States v. Fioravanti*, *supra*:

> Hereafter, in this circuit, trial judges are not to give instructions either in the main body of the charge or in the form of a supplement that direct a juror to distrust his own judgment if he finds a large majority of the jurors taking a view different from his. Such an instruction will be deemed error, normally reversible error. Conceivably, in very extraordinary circumstances the error may be found so inconsequential as to avoid the necessity of reversal on appeal. But hereafter this court will not let a verdict stand which may hve been influenced in any way by an *Allen* Charge.

412 F.2d at 420.

In principle, if not in terms, the charge given in this case cannot be distinguished from the *Allen* charge which we have rejected. It thus offends our *Fioravanti* decision and should not have been given. However, as we have previously noted, no objection was ever made prior to the jury's verdict.

We recognize that in *Government of Virgin Islands v. Hernandez*, 476 F.2d 791 (3d Cir. 1973) an *Allen* charge was held to be "plain error." In that case, however, the court did not analyze or discuss the plain error standard nor did it find that manifest injustice would result without review. *See United States v. Young*, ____ U.S. ____, 53 U.S.L.W. 4159 (February 19, 1985). The Supreme Court's latest pronouncement on plain error review reaffirms that the determination of whether "plain error" has occurred and has resulted in a miscarriage of justice, is to be made by the reviewing court on a case-by-case basis, upon review of the entire record. *United States v. Young*, ____ U.S. ____, 53 U.S.L.W. at 4163. Our independent review of the entire record reveals that no manifest injustice resulted from the court's instruction. *See Namet v. United States*, 373 U.S. 179, 190-91 (1962); *Trent v. Atlantic City Electric Co.*, 334 F.2d 847, 859 (3d Cir. 1964). Thus, review under the plain error doctrine is unavailable and no new trial will be ordered on this ground.

III.

Nor did reversible error result from the judge's failure to respond to the September 12, 1983 juror's request to be excused by four o'clock the evening of the Jewish holiday of Yom Kippur. We find it significant that at no time after the initial request made on the Monday of September 12, did any juror ever again bring this matter to the attention of the district court judge. Although the jury had been instructed that it could communicate with the court by written message

and in fact it had done so to inform the court of its deadlock, no subsequent message or request was ever received by the court from the jury.

It is true that counsel for Kirby reminded the court twice of the jury's four o'clock concern -- a concern with which the district court judge apparently believed he had dealt.[3] Despite the fact that all defendants would obviously have been affected if the jury's verdict had been coerced, only one of the four defendants relies in his brief on the judge's failure to resolve the four o'clock issue, as grounds for a new trial independent of the *Allen* charge.[4] That response, as contained in Kirby's brief followed a discussion of the *Allen- Floravanti* charge and the entire argument addressing the "four o'clock issue" consists of this paragraph:

> Finally, the appellant asserts that the jury was not made sufficiently aware that they would not be required to meet through the evening, thereby interfering with the start of the Yom Kippur holiday. It is apparent from the haste in which they reached their verdict that they believed that a time limitation had been placed upon them to conclude deliberation prior to the end of the afternoon. Contrary to the request of defense counsel, N.T. 13.11-12, the Court declined to clarify this

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3. As recited in an earlier part of this opinion, when Kirby's counsel reminded the court that a juror was concerned about the Jewish holiday and desired a four o'clock departure on Friday, September 16, the Court told the jury "There are no time deadlines within which you must reach your verdict." When asked again by Kirby's counsel to address that subject and to inform the jury that there ws no four o'clock deadline, the court replied, "Well, I don't know hov I could make it any clearer." Appendix at 239a-240a.

4. Although each defendant incorporated arguments made by his co-defendants in briefs filed with this court, the only brief specifically to rely on the four o'clock issue independently of the *Allen* charge was Kirby's. Kirby did not even list this argument in his statement of issues presented.

ambiguity thereby leaving misapprehension under which the jury operated.

Thus, even in the defendants' briefs, the argument of jury coercion, to the extent that it relied on the district court's failure to respond directly to a request made four days earlier by the jury, assumes little significance. Nevertheless, because the issue has been raised in connection with the district court's supplementary charge, a brief examination of the standard relevant to jury deliberation is appropriate.

The four o'clock issue we are discussing here is not, as the dissent claims, whether Yom Kippur is a holiday of great religious significance. It obviously is. The relevant standar and issue is whether the trial judge abused his discretion by the manner in which he responded to a juror's request made some four days earlier. This standard and issue are neither addressed, recognized nor applied in the dissent, which is largely devoted to the religious aspects of both the Jewish and Christian holy days. In our review of the record, the district court did not abuse his discretion.

"The length of time a jury may be kept together for the purpose of deliberation is a matter within the discretion of the trial judge, and his action in requiring further deliberation after the jury has reported a disagreement does not, without more, constitute coercion." *United States v. Grosso*, 358 F.2d 154, 159 (3d Cir. 1966), *rev'd on other grounds*, 390 U.S. 62 (1968); *accord*, *Government of Virgin Islands v. Gereau*, 502 F.2d 914, 935 (3d Cir. 1974). Thus, the district court's actions in dealing with counsel's suggestion and in sending the jury back for further deliberations in this case do not constitute an improper exercise of discretion, nor can they be held to constitute coersion. The impending holiday of and by itself is an insufficient additional factor to render the district court's order for further deliberations coercive.

Grosso is instructive on this point. In *Grosso*, one of the jurors became sufficiently ill to require the assistance of a physician, who diagnosed a nervous disorder. Nevertheless, the trial judge refused to order a mistrial, and deliberations continued as soon as the ill juror was well enough. Despite a note from the jury that indicated it was deadlocked, the district court judge ordered the jury to continue deliberations. According to the *Grosso* court, the illness of a juror might be considered as an unduly coercive circumstance, but only if evidence indicated that the jury's verdict was in fact influenced by that circumstance. The *Grosso* court found no such evidence.

Similarly, here, there is no evidence that the jurors were coerced to agree upon a verdict by the impending onset of the Yom Kippur holiday. Indeed, it is significant that of the thirty-six counts on which the jury was deliberating, twenty-eight of the counts remained unresolved.

While some courts have found the length of time the jury was made to deliberate, to be coercive, see *United States v. Chaney*, 559 F.2d 1094 (7th Cir. 1977); *United States v. Flannery*, 451 F.2d 880 (1st Cir. 1971), these cases have involved *affirmative* coercive conduct of the district court, such as reminding the jury that the weekend was approaching (*Flannery*), or creating the impression that the jury would be locked up all night (*Chaney*). No such affirmative coercive conduct occurred in this case and, absent evidence that the jury was influenced by a prescribed deadline or the approaching holiday, the court's mere failure to respond to a juror's request cannot be deemed coercive.

IV.

In addition to the general claims asserted by all four defendants, Graham challenges the sufficiency of

the evidence to sustain his conviction on Counts 22 and 23 of the indictment. These counts charged Graham with aiding and abetting the filing of a false tax return. In our review of the sufficiency of the evidence after a jury verdict in favor of the government, "[i]t is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of the jury must be sustained if there is substantial evidence, taking the view most favorable to the government, to support it." *Glasser v. United States*, 315 U.S. 60, 80 (1942).

Taking the view most favorable to the government, we find sufficient evidence to support Graham's conviction for aiding and abetting the filing of a false return. To establish aiding and abetting the filing of a false tax return "there must exist some affirmative participation which at least encourages the perpetrator." *United States v. Buttorff*, 572 F.2d 619, 623 (8th Cir. 1978) (quoting *United States v. Thomas*, 469 F.2d 145, 147 (8th Cir. 1972), *cert. denied*, 410 U.S. 957 (1973)).

David Kosco testified that he gave Graham $5,000 to open up a Swiss bank account in Kosco's name through Graham's investment firm. According to Kosco, "[A]t the time I was investing the money, [Graham] said, you know, being it was a foreign government, and the U.S. had no jurisdiction over it, you know, not to pay the taxes." Appendix at 110a. Kosco further testified that he did not report the interest earned in this account on his tax returns for the years 1978 or 1979. On cross examination, Kosco testified that these returns were prepared by an accountant, and that Kosco did not inform the accountant that he had received this interest.

Viewing this testimony in the light most favorable to the government, there is clearly sufficient evidence to allow a rational trier of fact to conclude that Graham, by setting up the account and telling Kosco

not to report the interest, engaged in "some affirmative participation which at least encourage[d] the perpetrator [Kosco]." The intervention of time from the dealings between Kosco and Graham to the actual filing of the return does not negate this aid; nor does the fact that an accountant, not a party to the Swiss bank transaction, completed the return.[5]

V.

None of the defendants' other contentions (see Appendix A to this opinion) merit discussion. Upon review of the record we are satisfied that sufficient evidence of conduct not protected by the first amendment was submitted to the jury to sustain the conspiracy convictions. *See United States v. Buttorff, supra.* We are also satisfied that there was sufficient evidence to convict the four defendants and that the district judge did not err in excluding tape recordings of the defendant's meetings. The defendants' challenges to the constitutionality and applicability of the income tax and to the jurisdiction of the district court do not deserve discussion.

For the foregoing reasons, the judgments of the district court will be affirmed.

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5. Graham also challenges the materiality of the omission on Kosco's return, as the interest unreported for both years combined amounted to but $250. Graham failed to preserve this issue for appeal, as his motion for acquittal relied only on the claimed insufficiency of the nexus between Graham's conduct and the false tax return. *See* United States v. Gibbs, 739 F.2d 838 (3d Cir.) (issue not preserved unless raised at earliest possible time), *cert. denied*, 53 U.S.L.W. 3489 (January 7, 1985); United States v. Bonacorsa, 529 F.2d 1218 (2d C.r.), *cert. denied*, 426 U.S. 935 (1976) (objection to whole count of indictment doesn't preserve objection to particular specifications). In any event, it is established that a misstatement on a return is material if, as here, it results in an incorrect computation of the tax. United States v. Warden, 545 F.2d 32 (7th Cir. 1976).

APPENDIX A

Graham challenges his conviction on the grounds (1) that the district court erred in denying his motion for acquittal for insufficiency of evidence to support his conviction under 26 U.S.C. § 7602(2), (2) that the government failed to present sufficient evidence to sustain a conspiracy conviction under 18 U.S.C. § 371, (3) that the district court erred in its supplemental charge to the jury, (4) that the district court judge erred in instructing the jury that Graham had improperly invoked his fifth amendment privilege against self-incrimination on his tax return, (5) that the court erred by failing to compel admission by the government of the authenticity of a certain letter sent by the IRS to Victor G. Petersen, and (6) that the district court erred in admitting co-conspirators' out-of-court statements prior to prima facie proof of the existence of a single theory conspiracy. The jury reached no verdict on the count covered by the instruction on the privilege against self-incrimination.

Kirby contends (1) that evidence of conduct unprotected by the first amendment presented was insufficient to sustain his conviction, (2) that the court erred in refusing to admit on defendants' behalf government tape recordings of the group's meetings, and (3) that the court's supplemental charge to the jury was error. Kirby further adopts all the arguments advanced by his co-defendants.

Balchaitis contends (1) that the government failed to present sufficient evidence to sustain the conviction for filing a false withholding certificate, (2) that the district court erred in refusing to admit on defendants' behalf government tape recordings of the group's meetings, (3) that evidence was insufficient to sustain the conviction for conspiracy to defraud since the activities were protected by the first amendment, (4) that the court's supplemental charge to the jury was

error, (5) that the district court lacked subject matter jurisdiction to hear the case, (6) that Balchaitis was denied his right to counsel of choice, (7) that Balchaitis was, as a matter of law, not required to file a W-4 form, (8) that Balchaitis was not required to file a tax return in 1980, and (9) that the government failed to show that Balchaitis had acted wilfully. Balchaitis further adopts all relevant arguments of his co-defendants. As part of the argument in his pro se brief that the district court lacked subject matter jurisdiction, Balchaitis contends that the income tax may not constitutionally be applied to wages paid to individuals.

Greenspun contends (1) that insufficient evidence of conduct unprotected by the first amendment was presented to sustain his conspiracy conviction, (2) that insufficient evidence of any kind was presented to sustain his conspiracy conviction, (3) that the district court erred in refusing to admit on defendants' behalf government tape recordings of the group's meetings, and (4) that the supplemental charge to the jury was error. Greenspun further adopts the arguments of his co-defendants.

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*, dissenting.

I dissent from the majority's conclusion that the "court's mere failure to respond to a juror's request [that the jury be timely excused to observe Yom Kippur] cannot be deemed coercive." Typescript Opinion at 14. Yom Kippur -- the Day of Atonement -- is the holiest day on the Jewish calendar. It is not a day of joyous celebration, but rather a day of fasting and prayer.[1] Recognizing that for Jews Yom Kippur is at least as sacred as Christmas is to Christians, I believe that the failure of the trial judge to advise jurors that they would be released by 4:00 p.m. on the evening that Yom Kippur was to begin, when viewed in the context of the jury's deliberations, was so coercive that it denied the defendants a fair trial. I would hold similarly if, in response to a request to be excused for Christmas, a judge failed to advise jurors that they would not have to deliberate on Christmas day. Yom Kippur should receive no less respect in the federal courts than does Christmas, and it is inconceivable to me that any judge would permit a jury to doubt whether they would have to deliberate on Christmas Day.

In the most unequivocal request possible, *five days before Yom Kippur*, the jury asked the trial judge through the message of one juror:

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1. On the Day of Atonement the Jew stands naked and defenseless before God. All his wrongdoings testify against him, and his sole recourse is to throw himself, with prayers and sincere repentance, on the mercy of God. On this day alone Jews kneel and prostrate themselves in synagogue, and the liturgy recalls the atonement ritual in the ancient temple . . . . Something of the awesome character of this day has survived right up to the present.

N. de Lange, *Atlas of the Jewish World* 97 (1984).

Your Honor,

I would like to request of the court on behalf of the Jewish juror's [sic] and possible others, that we be *dismissed* on *Friday* at *4:00 P.M.* This is the eve of *Yom Kippur* which starts the beginning of a 24 hour f ... We must be home to prepare and eat dinner before 6:00 P.M. in order to begin the holiday tradition of synagogue and our fast.

Thank you very much for your consideration.

Despite this timely message, *the jury was never informed that they would be dismissed on Friday at 4:00 p.m.* By Friday morning at 11:00 a.m. they had been deliberating for more than two full days and for more than seventeen hours, and they sent the following note to the district judge:

Your Honor,

After approximately 17 hours of deliberation we have reached a verdict against only one of the defendants on two counts.

After careful and intensive debate, there is no doubt in any of our minds that we can not reach a unaminous [sic] verdict on any of the other charges.

Therefore further deliberations would be fruitless.

The judge read this message to counsel and indicated that he would give the jury a supplemental charge. At this point, counsel for defendant Kirby, concerned that the jury might consider four o'clock that afternoon as a deadline for its verdict, pointedly reminded the judge of the juror's prior note regarding Yom Kippur:

> MR. PATRIZIO: Your honor, I would have a request that this jury be told that 4 o'clock was one of the juror's request to be adjourned by today. They might be operating under the assumption that they have to make a decision by 4 o'clock today, and I would request that they be told that that is not a deadline, that they'll come back on another day to resume their deliberations.

With his customary sensitivity, the trial judge recognized the reasonableness of counsel's request that the jury be instructed that they did not "have to make a decision by 4 o'clock today . . . that that is not a deadline," and that they could "come back on another day to resume their deliberations." The trial judge promised: "All right I'll say something to that." Instead of advising the jury that they could depart on Friday at 4:00 p.m., and come back on another day to resume deliberations, the trial judge gave a supplemental instruction which is known among trial judges as the "dynamite" -- or *Allen* -- charge, *United States v. Flannery*, 451 F.2d 880, 883 (1st Cir. 1971), and which is violative of this court's express admonition in *United States v. Fioravanti*, 412 F.2d 407 (3d Cir.), *cert. denied*, 396 U.S. 837 (1969).[2]

To compound the matter, when giving the forbidden Allen charge[3] as a supplemental instruction, the trial judge told the jury:

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2. The issue as to whether there was a "manifest injustice" by the giving of the discredited *Allen* charge is a close one and it may rise to plain error. However, I need not reach that issue in view of the fact that I believe that all of the defendants are entitled to a new trial for the reasons noted. *See* Government of the Virgin Islands v. Hernandez, 476 F.2d 791 (3d Cir. 1973).

3. For the history of the *Allen* charge, see Allen v. United States, 164 U.S. 492 (1896) and United States v. Fioravanti, 412 F.2d at 415-16.

> You may conduct your deliberations as you choose, but I suggest that you now carefully reexamine and reconsider all the evidence in the case, bearing upon the questions before you.
>
> *You may be as leisurely in your deliberations as the occasion may require, and you may take all the time which you feel is necessary. There are no time deadlines within which you must reach a verdict.*
>
> You may now retire and continue your deliberations in such manner as shall be determined by your good and conscientious [sic] judgment as reasonable men and women.

(Emphasis added.)

Unfortunately, after dealing with the other aspects of his supplemental charge, the trial judge, through inadvertence, did not assure the jury that they would be dismissed for Yom Kippur. However, the fairness of the request was so firmly implanted in his mind that the trial judge had thought that he had actually given it. The foregoing is the only explanation of the colloquy between the trial judge and counsel after the supplemental instruction:

> MR. PATRIZIO: Judge, I'm still not sure whether or not this jury understands that they are going to be permitted to leave at 4 o'clock. I don't think they've ever been told that.
>
> THE COURT: Well, I don't know how I could make it any clearer.

The court's supplemental instruction that "[t]here are no time deadlines within which you must reach a verdict" could not be construed as addressing the jury's concern. Surely the jury understood from that remark that there were no time deadlines imposed upon them *by the court*. In that sense, they were aware that they were probably free to deliberate until 10:30 p.m., as

they had done the night before, and on the following day. Yet for the Jewish members of the jury and for those jurors who, though they were not Jewish, recognized and desired to accommodate the religious practices of others, such an instruction failed to address their expressed concern.

While the majority finds it significant that after the initial request made on Monday, September 12, no subsequent request was ever received, I find this unimportant. Once expressed, the district court should have addressed the concern. The jury could not reasonably infer from the lack of the court's response that the Monday request would be granted. What I do find significant is that the jury returned with their verdict at 3:20 p.m., just forty minutes before the time the court had been advised some jurors would have to leave in order to observe Yom Kippur, and that the jury was actually discharged at 3:45 p.m.

This case is without precedent as to its factual context, but the teachings of several cases are quite relevant. In the clearest language possible, the Supreme Court has recognized that "the principle that jurors may not be coerced into surrendering views conscientiously held is so clear as to require no elaboration." *Jenkins v. United States*, 380 U.S. 445, 446 (1965). And the Court has noted that in determining whether there has been coercion of the jury, we must look at "all the circumstances." *Id.*, 380 U.S. at 446. More than fifteen years ago in a seminal opinion written by Judge Aldisert, we noted:

> So long as the unanimous verdict is required in criminal cases, there will always be three possible decisions of the jury: (1) not guilty of any charge; (2) guilty of one or more counts of the indictment; and (3) no verdict because of a lack of unanimity. The possibility of a hung jury is as much a part of our jury unanimity schema as are verdicts of guilty or not guilty. And although

> dictates of sound judicial administration tend to encourage the rendition of verdicts rather than suffer the experience of hung juries, nevertheless, it is a cardinal principle of the law that a trial judge may not coerce a jury to the extent of demanding that they return a verdict.

Fioravanti, 412 F.2d at 416.

In *United States v. Flannery*, 451 F.2d 880 (1st Cir. 1971) the First Circuit noted that it was reversible error where "the court erred in reminding the jury that it was Friday afternoon. . . . The implicit suggestion, although doubtless unintended, was that it was more important to be quick than to be thoughtful." 451 F.2d at 883. In *Brasfield v. United States*, 272 U.S. 448, 450 (1926), more than a half century ago, Justice Stone noted that the coercive effect of a judge's remarks "will often depend upon circumstances which cannot properly be known to the trial judge or to the appellate courts and may vary widely in different situations . . . ." He warned against making remarks where "in general [the] tendency is coercive." He stressed that some inquiries "can rarely be resorted to without bringing to bear in some degree, serious, although not measurable, an improper influence upon the jury, from whose deliberations every consideration other than that of the evidence and the law as expounded in a proper charge, should be excluded." *Id.*, 272 U.S. at 450.

In this case, there was injected a situation, or improper influence which had an inherent tendency to be coercive to some members of the jury. The failure to advise the jury that they would be released from jury service in time for Yom Kippur certainly tended to be coercive. Jurors should not have to consider, in addition to the "evidence and the law as expounded in a proper charge," whether they will have to be in court rather than synagogue on their holiest day of the year.

For these reasons, I respectfully dissent.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

(A.O. U.S. Courts. G.M.C. Printing. Phila., Pa. 215-568-4264)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

vs. No. 83-140

ROBERT B. GRAHAM, SR.

M E M O R A N D U M

Newcomer, J.

Defendant Robert B. Graham, Sr., together with three co-defendants, was indicted on one count of conspiracy (Count I) to defraud the United States by impeding the lawful functions of the Internal Revenue Service in the computation and collection of income taxes due and owing from various specified individuals. Graham was also charged with fifteen counts of aiding in the preparation and presentation of false Internal

Revenue Forms W-4 in violation of 26 U.S.C. 7206 (2) (Counts 2-16), two counts of aiding in the preparation and presentation of false tax returns in violation of 26 U.S.C. 7206 (2) (Counts 22-23), and five counts of aiding and abetting others in their willful failure to file personal federal income tax returns in vilation of 26 U.S.C. 7203 and 18 U.S.C. 2 (Counts 24-28).[1] Following a two-week trial the jury returned verdicts of guilty on Counts 1, 22, and 23. No verdict was reached on the balance of the Counts against Graham.

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[1]Graham was also charged in Indictment Criminal No. 83-217 with three counts of willful failure to file his own personal federal income tax returns. This indictment is not at issue in the motion before me at this time.

On March 20, 1984, the Third Circuit afirmed Graham's convictions. Presently before me is Graham's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. 2255. The motion is based upon alleged ineffective assistance of counsel, insufficiency of evidence, and the occurrence of plain error at trial. For reasons discussed below the motion will be denied.

The portion of defendant's motion raising the issue of ineffective assistance of trial counsel arises out of a modified "Allen" type charge given to the jury during the course of its deliberations to which no objection was made. The facts giving rise to this motion are set forth in a previous memorandum and order in which I denied a similar

motion filed by Graham's co-defendant, Milton Greenspun. See Unites States v. Greenspun, Cr. No. 83-140-4 (E.D. Pa. April 30, 1985). I therefore will not repeat them here. The legal analysis set forth in that opinion is likewise applicable to the instant motion and need not be repeated. I therefore turn to an analysis of whether counsel's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland v. Washington, __U.S. ___, 104 S.Ct. 2064 (1984). As noted previously, this entails a review of the entire record.[2]

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[2] The government and counsel for defendant filed their briefs on this motion 10 days and 21 days, respectively, after entry of my order in the Greenspun

(Footnote continued)

As with defendant Greenspun, the eveidence at trial plainly established the existence of a conspiracy as alleged in the indictment and further established defendant's participation in that conspiracy. Specifically, the evidence established that all four defendants were members of a group known as the Committee for Constitutional Taxation. The group held many meetings from

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(Footnote Continued)
case. Disappointingly, neither counsel attempted to analyze Graham's case in light of that memorandum and order. While it is possible that counsel for defendant was unaware of that order, no such inference is possible with respect to the government inasmuch as the Greenspun order is attached to the government's brief in this case. In fact, the government's wholesale reliance in this case upon its brief in response to the Greenspun motion is wholly inappropriate. Graham was convicted of offenses Green-
(Footnote continued)

the late 1970's through the summer of 1982. At these meetings taxpayers were lectured on the constitutionality of various portions of the Internal Revenue Code. For instance, the defendants advised individuals of their belief that wages could not be considered "income" for tax purposes, that the 16th Amendment, which authorizes Congress to impose an income tax, was not properly ratified, and that the requirement of filing an annual personal income tax return violated a citizen's guarantees against unreasonable searches and seizures and compelled self-incrimination contained in the 4th and

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(Footnote continued)
spun was not charged with. Thus, an evaluation of the evidence against Greenspun would not necessarily cover all the issues raised by Graham's motion.

5th Amendments.

Attendees at the meetings were also informed of various ways in which they could make the Internal Revenue Service's task of assissing and collecting taxes difficult, if not impossible. For example, to reduce automatic withholding, they were advised to claim nine exemptions on the W-4 forms filed with their employers, and in some cases to claim exemption from withholding. They were further told to avoid the use of credit cards and banks so as to preclude tracing of their finances. The only banking practice encourages was referred to as the "Bank of the Month" club and involved repetitive opening and closing of small accounts at various banks as as to create a confusing trail

of paper. "Cooley kits," which instructed an individual on how to file a "Fifth Amendment" tax return, were sold at the meetings. Finally, if the IRS attempted to audit their returns, attendees at the meetings were advised to flood the auditor with receipts documenting claimed deductions and to shuffle the receipts at the end of the day.

Defendants Graham and Kirby conducted meetings held in Bucks County and defendants Balchaitis and Greenspun conducted meetings of the Delaware Chapter of the group. Graham was generally considered to be the leader of the movement in the Philadelphia area.

Graham's participation in the conspiracy was established initailly through the testimony of IRS Special Agent

William Patrick O'Connor. Agent O'Connor assumed an undercover role and attended meetings conducted by Graham from late 1981 into the fall of 1982. A host of individuals who had attended meetings conducted by Graham in 1981 and 1982, but who had apparently become disenchanted with the Committee's teachings, corroborated Agent O'Connor's testimony. Former Agent Huntkowski and tax auditors Leavins and Ciccone each testified to the efforts of various individuals, including Mr. Graham, to obstruct IRS audits of individual taxpayers. All of this testimony provided an ample basis for the jury's verdict on the conspiracy count. For reasons previously stated, I also believe the jury properly rejected Graham's First Amendment defense.

Graham was also convicted of two counts of aiding and abetting the filing of false and fraudulent income tax returns. These counts arose out of Graham's advice to an unindicted individual, David Kosco, to the effect that Kosco need not report as taxable income the interest earned on a Swiss bank account. Mr. Kosco's testimony at trial provided more than ample basis for defendant's conviction on these two counts.[3]

I therefore conclude petitioner has failed to establish a "reasonable probability" that, but for the errors which occurred at trial, the decision

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[3]Graham's own testimony did little, if anything, to counteract the government's evidence on Counts 1, 22, and 23. Instead, the bulk of his testimony appeared to be directed at estab-

(Footnote continued)

reached would have been different.[4] Strickland, 104 S.Ct. at 2068. Because of this conclusion I need not consider whether counsel's performance was deficient.

The balance of Graham's motion can be readily dismissed. First, Graham contends he is entitled to the relief requested because my delivery of the modified Allen-type charge to the jury constituted "plain error". This is precisely the issue which was before the Third Circuit on direct appeal and which was rejected. United States v. Graham,

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(Footnote continued)
lishing his good faith belief in the rightfulness of his actions with respect to the willful failure to file counts. See United States v. Edelson, 604 F.2d 232 (3rd Cir. 1979).

C.A. Nos. 83-1797, 83-1932, 83-1933, 83-1934, Slip. op at 10 (3d Cir. March 20, 1985). Accordingly, Graham's motion as to this issue must be denied.

Finally, Graham argues his conviction must be vacated at this time because the evidence adduced at trial was insufficient. This argument was rejected by the Third Circuit on direct appeal with respect ot Counts 22 and 23. See Unites States v. Graham, supra at 14-15. Assuming insufficiency of the evidence can be raised in a §2255 petition when there has been a direct appeal,[5] my conclusions above concerning Graham's claim of ineffective assistance of counsel make clear my view that the evidence was more

than adequate to sustain the convictions on Counts 1, 22, and 23.

Clarence C. Newcomer, J.

[4]Prior to the supplemental charge the jury informed the Court it could reach a verdict as to only one count. Following the charge, verdicts were reached on eight counts, three of which were guilty verdicts against Graham. Graham contends that the finding of prejudice necessary under Strickland may be inferred from these facts. I disagree. Prejudice may be found, in my view, only if there is a casual nexus between the charge and the verdict. The only way I know of to determine whether there is any possibility of such a nexus is to evaluate the weight and quality of the evidence adduced at trial.

[5]See, United States v. Milestone, 620 F.2d 264, 266, n.1 (3d Cir. 1980).

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v. No. 83-140

ROBERT B. GRAHAM, SR.

O R D E R

AND NOW, this day of June, 1985, it is hereby Ordered that defendant's motion to vacate, set aside, or correct sentence pursuant to 28 U.S.C. §2255, is DENIED.

IT IS FURTHER ORDERED that defendant's motion for bail pending disposition of his §2255 motion is DISMISSED as MOOT.

AND IT IS SO ORDERED.

Clarence C. Newcomer, J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 85-1447

UNITED STATES OF AMERICA

Appellee

v.

GRAHAM, ROBERT B.

ROBERT B. GRAHAM, SR.

Appellant

Appeal from the United States District Court for the Eastern District of Pennsylvania
(D.C. No. CR 83-00140-01)
District Judge: Honorable Clarence C. Newcomer

Submitted under Third Circuit
Rule 12 (b) Monday,
February 10, 1986

BEFORE: HUNTER and GARTH, Circuit Judges
And FISHER, Chief District Judge*

JUDGMENT ORDER

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*Honorable Clarkson S. Fisher, United States Chief District Judge for the District of New Jersey, sitting by designation.

After consideration of the contentions raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,

Circuit Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA
CRIMINAL ACTION

v

ROBERT B. GRAHAM, SR.
NO. 85-2313

AFFIDAVIT IN SUPPORT OF DEFENDANT'S 2255 MOTION TO VACATE SENTENCE

NOW INTO COURT comes RONALD BOUTWELL, ESQUIRE, an attorney-at-law (hereinafter referred to as the "Affiant") who does hereby represent the following:

1. The Affiant represented the defendant in the above-referenced matter, ROBERT G. GRAHAM, SR. at his trial, along with co-counsel, THOMAS A. BERGSTROM.

2. The Affiant is a member of the California Bar and has an office in Las Vegas, Nevada.

3. At trial, the Honorable Clarence C. Newcomer, the presiding judge, on September 16, 1983 gave a charge aimed at obtaining a jury verdict by breaking the deadlock then in existence.

4. The so-called "Allen" charge given by the trial court judge was violative of the Third Circuit Court of Appeals' opinion in United States v. Fioravanti, 412 F.2d 407 (3rd Cir. 1969), cert den. sub nom Pannacione v. United States, 396 U.S. 837 (1969), wherein the appellate court stated that:

> "Hereafter, in this circuit, trial judges are not to give instructions either in the main body of the charge or in the form of a supplement that direct a juror to distrust his own judgement if he finds a large majority of the jurors taking a different view from his. Such an instruction will

> be deemed error, normally reversible error. Conceivably, in very extraordinary circumstances the error may be found so inconsequential as to avoid the necessity of reversal on appeal. But hereafter this court will not let a verdict stand which may have been influenced in any way by an Allen charge".

United States v. Fioravanti, supra, at 420.

5. The Affiant further states that he failed to timely object to the giving of said Allen charge at trail prior to the jury's verdict.

6. The Affiant further states that because of his failure to so object, to the giving of said Allen charge, that a manifest injustice occured as to the defendant, ROBERT B. GRAHAM, SR.

Affiant does hereby certify that the above representations are true and

correct, to the best of his knowledge, and asks this Honorable Court to consider said averments in conjunction with the defendan's Motion to Vacate Sentence, filed pursuant to 28 U.S.C. 2255 on April 24, 1985, No. 85-2313.

/S/
AFFIANT

Sworn to and Subscribed
before me this ___ day
of _____, 1985

/s/
Notary Public